



POLICE DEPARTMENT

February 1, 2011

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Marco Trujillo
Tax Registry No. 910954
13 Precinct
Disciplinary Case No. 85823/09

The above-named member of the Department appeared before the Court on October 21, 2010, charged with the following:

1. Said Sergeant Marco Trujillo, assigned to the Intelligence Operations and Analysis Section, on or about September 22, 2008, in the vicinity of Jerome Avenue and Mosholu Parkway in Bronx County, conducted a car stop of [REDACTED] during which he found narcotics and did not follow proper procedure when he failed to handcuff Mr. [REDACTED] and utilized Mr. [REDACTED]'s vehicle to transport himself and said individual to the 52nd Precinct.

P.G. 208-02, Page 1, Paragraph 2 - ARRESTS – REMOVAL TO DEPARTMENT FACILITY

P.G. 208-06, Page 1, Paragraph 1 - ARRESTS – SECURITY MEASURES

2. Said Sergeant Marco Trujillo, assigned as indicated in Specification #1, on or about January 21, 2009, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said sergeant, after receiving appearance notifications, failed to appear in court.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Michelle Alleyne, Esq., Department Advocate's Office, and the Respondent was represented by John D'Alessandro, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer Roberto Telese and Sergeant Mindy Fisher as witnesses.

Police Officer Roberto Telese

Telese had been a member of the Department for six years and was currently assigned to the Technical Assistance and Response Unit (TARU). Prior to that, he was assigned to the 52 Precinct, working on a conditions team.

Telese testified that on September 28, 2008, he was working with the Respondent as an assistant field intelligence officer (FIO). He had not worked with the Respondent prior to this incident. Telese was assigned to work with the Respondent in plain clothes and perform patrol duties in an unmarked vehicle. Telese was assigned as the recorder and the Respondent was the operator. Telese stated that there was no cage mechanism in the vehicle, nor was there a mobile digital terminal (MDT).

Telese testified that while on patrol, he observed a white pick-up or tow truck make an illegal U-turn. The driver of the truck had come out of the vehicle and went inside a bodega.

Telese stated that he did not speak with the driver of the truck, now identified as [REDACTED], but that the Respondent had a conversation with Emanuele that lasted a few minutes. The Respondent, [REDACTED], and Telese then went outside by [REDACTED]'s truck where another conversation between the Respondent and [REDACTED] took place. Telese said he was approximately six feet away and did not hear the conversation, which lasted about 20 minutes.

Telese testified that he did not conduct a warrant check on [REDACTED]'s driver's license because such a check was unnecessary before issuing a summons for a U-turn violation.

After the Respondent's conversation with [REDACTED], the Respondent instructed Telese to take the unmarked police vehicle back to the precinct while the Respondent drove [REDACTED]'s truck back to the precinct.

Telese testified that he observed [REDACTED] get into the passenger seat of his truck, unhandcuffed. When they arrived at the precinct about five minutes later, Telese said [REDACTED] was still not handcuffed. Telese then conducted a check on [REDACTED]'s driver's license and found that it was suspended. [REDACTED] was placed under arrest, the truck was searched, and Telese recovered two bags of marijuana and two police scanners from the center console's cup holder. The evidence was in plain view. Telese also recovered a gravity knife from [REDACTED]'s person. Telese did not recall if [REDACTED] was searched prior to getting in the tow truck.

Telese was later called by the District Attorney's (DA) Office, and testified before the grand jury regarding [REDACTED]'s arrest.

On cross-examination, Telese stated that the vehicle he and the Respondent were in was not an unmarked police vehicle but rather the Respondent's personal vehicle. Telese was aware that sometimes officers registered their personal cars with the Department to use while on duty.

Telese acknowledged that it was not typical to handcuff and remove suspects to the precinct for a traffic infraction but it could be done under some circumstances. Telese also acknowledged that he was not sure if [REDACTED] was under arrest during the initial stop.

On re-direct examination, Telese acknowledged that the issuing state of a driver's license did not affect the procedure for conducting a warrant check. Telese also acknowledged he would have arrested [REDACTED] at the scene had he seen the marijuana at the scene of the bodega. Moreover, Telese testified that he was under the impression there was an investigation being conducted against [REDACTED] from the time the man was questioned until he was arrested in the precinct parking lot. He also acknowledged that the way he would transport a person under investigation would be to place that person in handcuffs and then bring him to the precinct. However, if the person was a witness, he would not handcuff him, but rather would have the witness follow him to the precinct.

On re-cross-examination, Telese stated that he would not always arrest a person for the possession of marijuana. In certain situations, Telese would bring the individual to the precinct to perform a more efficient search. Telese said that it was not unusual for an officer to drive an arrestee's car back to the precinct. He had never seen an officer drive a civilian's car while the civilian was in the passenger seat.

Upon examination by the Court, Telese stated that this was the first time he was assigned in a field intelligence capacity.

The marijuana was contained in ziplock bags. Telese characterized them each as worth at least \$10 on the street. The cup holder in which the bags were found would be at the driver's right hand if his arm was upon the arm rest.

Sergeant Mindy Fisher

Fisher had been a member of the Department for 11 years and was assigned to the Internal Affairs Bureau (IAB). She was previously assigned to, inter alia, the Bronx Gang Unit and the 52 Precinct.

Fisher received this case from another investigator and therefore did not begin the initial investigation. Besides the allegations against the Respondent, there was also an allegation against Telese for perjury. The initial complaint was made by the DA's Office.

Fisher testified that Telese gave different accounts in court about the incident. The investigation later showed that rather than committing perjury, Telese's account in the grand jury was brief and "just left some things out."

Fisher testified that a summons was not mandatory for a traffic violation. Moreover, when issued, a summons was in lieu of an arrest. In her experience, if she were to issue a summons to an individual, she would first check the driver's information on the MDT. If an MDT was not available, she would contact another vehicle that had an MDT. There was also the option of transmitting the information over the Department radio or calling the precinct directly. This procedure was to make sure the driver did not have a suspended license or a warrant. Fisher stated that she had never issued a summons without first conducting a warrant check.

Fisher further stated she never drove the vehicle of a witness, suspect, or arrestee while he was sitting in the passenger seat because it would be inconsistent with Department procedure. If she were to issue a summons for a traffic violation, but observed contraband in the vehicle, she would make an arrest rather than issue a summons. The driver was also subject to a frisk during a car stop, depending on the circumstances.

Fisher testified that one of the allegations against the Respondent was that he failed to appear in court regarding [REDACTED]'s arrest. The computer-generated notification sheet (see Department's Exhibit [DX] 2) indicated that on January 8, 2009, the Respondent was notified of a January 21, 2009, court date. Handwritten on the document was "1355 - 1/8 Faxed." DX 1 was the Intelligence Division ("Intel") notification log. It stated that the Respondent was e-mailed the notification to his Department account. He was issued a BlackBerry by the Department.

On cross-examination, Fisher acknowledged that the Respondent told her during his official Department interview that he also received notifications by telephone. He stated that the assigned assistant district attorney (ADA) might have done so in this case.

Fisher admitted that there was no indication, beyond the fact that the notification was faxed and e-mailed, that the Respondent received the notification. DX 2 was not signed by the Respondent. Fisher agreed that Patrol Guide § 211-05, governing court appearances, did not mention e-mail as an acceptable form of notification. The member was supposed to be given the court notification by the precinct desk officer, sign the notification, then return the signed copy to the desk officer.

However, Fisher also acknowledged that because it was convenient for the DA's Office, the Respondent was notified via telephone and e-mail. She also acknowledged that there were no investigative steps taken to determine if an e-mail was actually sent. In the Department interview, the Respondent told Fisher he had been notified via e-mail but there was a problem with his BlackBerry because there was a firewall that blocked certain e-mails.

Fisher acknowledged that with respect to traffic violations and unlawful possession of marijuana, it was within the officer's discretion to either issue a summons or place the suspect under arrest. She had arrested suspects for marijuana instead of issuing a summons.

Fisher agreed that if she were conducting a driver's license check on a suspect and it turned out that individual was wanted for questioning by detectives, she would bring the suspect in for questioning. She would not drive the suspect's personal vehicle back to the precinct, but could not recall if this was prohibited by the Patrol Guide. She asserted that depending on the circumstances, such as her safety, she might handcuff the suspect before placing him in the vehicle.

Fisher acknowledged that the Respondent took [REDACTED] to the precinct to identify him properly. [REDACTED] was not under arrest when the Respondent transported him, but rather was placed under arrest when he arrived at the 52 Precinct for a felony-level suspended driver's license.

On re-direct examination, Fisher stated that the Respondent's office was in a building other than the 52 Precinct station house. His office did not have a desk officer. Fisher agreed that other members were listed on DX 1 as having been notified by e-mail. Fisher said that there were previous notifications for the [REDACTED] case that were made and cancelled by the Respondent. She could not recall the exact dates but two were cancelled because the time before the court date was too short. One might have been faxed to the wrong precinct.

Fisher stated that in order to issue a summons, a warrant check must be conducted.

Upon examination by the Court, Fisher stated that the Respondent's office probably had its own fax machine. She did not know what number DX 2 was faxed to. She knew of no fax

cover sheet Fisher agreed that the e-mail should have been sent from a Department e-mail address

The Respondent's Case

The Respondent testified on his own behalf

The Respondent

The Respondent had been employed by the Department for over nineteen years and was currently assigned to the 13 Precinct, where he was assigned to patrol He previously was assigned in an investigative capacity He later transferred to the Intelligence Division, where he investigated subjects who committed mostly felonies He worked as an undercover officer for eight years and had been involved in sales of over a thousand firearms, narcotics, and money laundering The Respondent also led the City in purchasing firearms until 2010

Regarding the incident with [REDACTED], the Respondent stated that he had been given information from a confidential informant (CI) that a person who drove a tow truck with the initials CMB on it was selling firearms The CI also said that the driver was "robbing" organized crime figures, using his tow truck to steal their vehicles

On the day of the incident in question, the Respondent was assigned to Intelligence in the 52 Precinct. He was working that night with Telese, with whom he had never worked before The Respondent observed the CMB tow truck run a red light and then make an illegal U-turn The operator of the truck, [REDACTED], got out of the truck and went inside a deli

The Respondent told Telese that the driver of the truck was under investigation for firearms trafficking. He was going to stop [REDACTED] and try to "identify" him. He instructed Telese to let him handle it and keep silent, but pay attention.

The Respondent then approached [REDACTED] and told him he observed the traffic violations. He asked for his driver's license for identification purposes, telling [REDACTED] that he would not even issue a summons. The Respondent testified that he would not have issued [REDACTED] a summons because doing so would have made him "hot." People, including the CI, would try and stay away from him and potentially jeopardize the investigation. He added that part of his responsibility was to ensure the safety of the CI.

The Respondent explained that he wanted not to make an arrest at that moment, but to enhance the case and "proceed forward to the bigger course, which is again investigation." His primary goal was to identify the individual so he could send his CI to purchase firearms. He also wanted to build a rapport with [REDACTED] and to know a little bit about him, so that he can confirm that his CI was telling the truth.

The Respondent further stated he did not feel comfortable with the out-of-state driver's license provided by [REDACTED], noting that it could be used as false identification. He told [REDACTED] "I just want to ID you just to protect me. I may have to give you a summons, would you mind coming back to the precinct?" He actually wanted [REDACTED] to come back to the precinct so that he could do a "confirmation identification." The Respondent wanted to retrieve an official photograph and possibly get a New York State Identification number (NYSID) so that he could confirm [REDACTED] with the CI. If the suspect was not properly identified, the investigation could not move forward.

The Respondent stated that [REDACTED] agreed to come back to the precinct. The Respondent asked the suspect, though, if he minded the Respondent driving the tow truck back. [REDACTED] agreed. The suspect allowed the Respondent to check his waist area, saying that he did not have anything on him.

The Respondent testified that this exchange made him confident. In his experience, "I know signs when there are pauses, searching for answers, you know, things like that. I did not get that. Everything was consistent and fast."

The Respondent then drove [REDACTED] back to the precinct. The Respondent added that this was not the first time he had driven a pick-up truck. He played dumb for [REDACTED], saying, "I just want to make sure who you are because I know nothing about Florida," i.e., the issuing state of [REDACTED]'s proffered license.

The Respondent asserted that even though this was a firearms investigation, based on his experience, he did not sense any danger. He also warned [REDACTED] that if he tried anything, he would get hurt very badly.

When asked whether officers in investigative assignments typically operate this way, the Respondent answered, "Absolutely. Investigations squads do it every single day, if not every hour of the day. [E]xperienced officers, experienced officers, put them in a car uncuffed, bring them in and let them think something different. Nothing in the Patrol Guide prohibited this, and ' [i]f you ask any experienced – the key word is experienced – they will tell you that.' This way, if the officer wanted the individual's cooperation later on, he could remind the suspect that he "never handcuffed them out in the street in front of people."

The Respondent testified that he had testified at least twice a week in court proceedings since 1996. He had an excellent rapport with the Bronx DA's Office and the office had his

phone number. He had never missed a court date and found it "offensive" that he was accused of doing so.

The Respondent testified that he spoke to an ADA, Isales, about the [REDACTED] case. She said that Telese "fell apart" in recounting the incident. The Respondent told Isales that this did not surprise him, and that he was more than willing to come down and discuss the matter. The Respondent could not recall if Isales was in a specialized bureau. He believed that she was assigned to [REDACTED]'s case only for the suspended license.

The Respondent testified that he did not receive any e-mails notifying him of a court appearance. He also said if he had been e-mailed, he still might not have received it because of two problems he was having with his account. First, he said, his computer was moved to a different office and it had not been set up yet by the Management Information Systems Division (MISD). Second, there was a filter on his Blackberry that prevented incoming e-mails for approximately six months. This problem was corrected after the [REDACTED] matter but occurred again. Before the filter was installed, the Respondent was able to receive e-mails from anyone.

On cross-examination, the Respondent stated that he got a brief look at [REDACTED] when the suspect exited the truck to go into the deli, but because he had been unsatisfied with the CI's brief description, he wanted a better look. He entered the deli and had a brief conversation with [REDACTED] while Telese followed behind. The Respondent identified himself with his shield, rank and name. He told [REDACTED] that because he did not "know your driver's license, I don't know if this is actually you," he wanted to bring him back to the precinct.

The Respondent stated that he did not call his command to conduct a check on [REDACTED] because the investigation was confidential. The Respondent acknowledged that the CI had informed him that [REDACTED] not only sold firearms but also carried one.

The Respondent testified that he frisked [REDACTED] and searched the lungeable area of the truck, with his consent. He observed a clip on [REDACTED]'s pocket and knew it was a knife but did not think it was a gravity knife. He did not see the bags of marijuana but admitted hearing the police scanners.

The Respondent testified that because he wanted to keep the investigation confidential, he did not call for transport for [REDACTED]. He stated that because of his experience in similar investigations, he did not feel he was risking his safety by driving [REDACTED]'s tow truck back to the precinct. He also said he did not see the two bags of marijuana because he was not focused on investigating drugs, as opposed to the firearms investigations. The Respondent admitted that the CI told him that [REDACTED] was also "involved with drugs." The Respondent asked [REDACTED] questions "that would rattle a typical druggie," and did not feel threatened.

The Respondent stated that he notified someone of his problem with his e-mail. While he was having that trouble, he was receiving phone calls from ADAs notifying him of court appearances. When his e-mail was working, he received notifications that would just give the date of appearance, the defendant's name, and date of arrest. It was not in any particular format and did not include a pdf copy of the notification sheet (cf. DX 2).

The Respondent testified that because he is no longer assigned to Intelligence, he gave the information about [REDACTED] to members there.

Upon examination by the Court, the Respondent stated that Isales was an assistant in a general crimes bureau of the DA's Office. He did not tell her the specific details of his investigation over the phone. She mentioned to him that he was "a very difficult person to get in touch with." He offered to come down to the DA's Office right away, but she said she had to get back to him.

FINDINGS AND ANALYSISIntroduction

The facts of this case are relatively simple and, for the most part, not in dispute. The Respondent was a field intelligence officer (FIO) in the 52 Precinct. He received information that a certain tow truck driver, identified only by the truck he drove, was selling firearms.

On September 22, 2008, the Respondent was working with Police Officer Telese. Telese was nominally designated the assistant FIO, but he and the Respondent never actually had worked together. They were operating, as authorized, in the Respondent's personal vehicle. In the area of Jerome Avenue and Moshulu Parkway, in the Bronx, the Respondent spotted the tow truck driver running a red light and making an illegal U-turn. The Respondent and Telese pulled the truck over and learned that the driver was named [REDACTED].

The Respondent testified that he wanted to bring [REDACTED] back to the precinct to further the firearms investigation. Specifically, he wanted to get a photograph of [REDACTED] to show to the CI that had brought him the information. The Respondent created a ruse in which he told [REDACTED] that he had to issue a summons for the traffic violation, but could not do so at the scene because [REDACTED] had an out-of-state driver's license. But the Respondent did not want [REDACTED] to get suspicious for any reason and flee. Thus, he told [REDACTED] that they would drive together in the tow truck to the precinct, with the Respondent operating. The Respondent instructed Telese to follow in the Respondent's vehicle. Telese was confused, but obeyed the instruction. [REDACTED] was not arrested or handcuffed. He rode in the passenger seat of the tow truck and the Respondent drove. The Department alleged that the Respondent noticed the presence of marijuana in the center console. He admitted at trial that he might have noticed it

Nevertheless, the Respondent's main aim was to further the investigation and get [REDACTED] to the precinct

At the precinct, Telese ran [REDACTED]'s license and discovered that his license to drive was suspended. The number of suspensions raised it to the felony level, making [REDACTED]'s arrest mandatory. Telese informed the Respondent and [REDACTED] was arrested. Telese was designated the arresting officer.

Although the Respondent testified that he was preparing a major investigation regarding firearms, and knew several ADAs that worked on those kinds of cases, he did not inform the DA's Office about any of the circumstances concerning [REDACTED]. Thus, instead of going into a specialized investigations unit at the DA's Office, the case was assigned to general crimes. When Telese went to testify before the grand jury, he apparently also failed to tell the ADA these details. At some point in the life of the case, the DA's Office became aware of what it considered to be a divergence between Telese's grand jury testimony and what they learned about the Respondent having transported [REDACTED], un-handcuffed and not under arrest, in the suspect's own vehicle.

It did not help matters that the Respondent missed a notification put in by the DA's Office on the [REDACTED] case. When the Respondent spoke to the ADA, she said she had trouble getting in touch with him. When he offered to rush down to the office and explain the situation to her, she said she would have to get back to him. The DA's Office, believing that both Telese and the Respondent had committed misconduct, made a referral to the Internal Affairs Bureau.

Specification No. 1

As developed at trial, the gravamen of the Department's case was that it was improper for the Respondent to transport [REDACTED] in his own tow truck, with the Respondent driving and [REDACTED] sitting un-handcuffed in the passenger seat. That certainly is part of what the specification charges but not all of it. To evaluate this specification, the entire language of the charge needs to be considered.

The specification in pertinent part charges that the Respondent "conducted a car stop of [REDACTED] during which he found narcotics and did not follow proper procedure when he failed to handcuff Mr. [REDACTED] and utilized Mr. [REDACTED]'s vehicle to transport himself and said individual to the 52nd Precinct."

The first issue to consider in analyzing this specification is the basis for the arrest that the Department claims the Respondent should have made. The Respondent testified that he might have seen the bags of marijuana in the tow truck. This is hardly proof that he did in fact see bags of marijuana in the tow truck, so it is not clear that he had a basis to make an arrest for marijuana.

More significant to the second issue raised in the charge is the fact that the marijuana could not have been seen until the Respondent entered the tow truck to drive. In short, the decision the Respondent made to drive the tow truck occurred before the opportunity to make the arrest for possession of the marijuana. Indeed, if the Respondent actually saw the marijuana, there is no evidence as to when he saw it. The observation could have occurred as he was getting out of the vehicle at the precinct. This brings the Court to the first claim in the specification: the Respondent found the narcotics as part of the car stop. But the observation, if it occurred at all, happened after the car stop and as part of the drive to the precinct. There is absolutely no

evidence that marijuana was observed by either officer at the time of the stop and before the Respondent made the decision to get into the tow truck

The claim that the marijuana should have been the basis for an arrest before [REDACTED] was transported to the precinct is so weak that the Assistant Department Advocate argued that the Respondent should have made the arrest for two traffic infractions. Certainly, the traffic infractions were observed before the Respondent made the decision to drive the tow truck, but arresting someone for traffic infractions would be highly unusual. More significantly, that is not what was charged.

There are other problems with the logic of the Department's charges. This is exemplified, again, in the arguments made by the Advocate. In her summation, the Advocate argued that at the least the Respondent should have summonsed [REDACTED] at the time of the traffic stop. That would have compelled him to call in a license check on [REDACTED], she argued, and he would have learned of the suspensions and made the felony arrest on the scene. That argument, of course, contains the fallacy of hindsight. The Respondent had no way of knowing about the potential felony arrest until he did the license check. If [REDACTED]'s license was unclouded, the Respondent at that point simply would have had to issue the summons and would have had no basis for enticing him to go to the precinct.

Of course, all of this ignores what the Respondent was attempting to do. He was working on discovering the identity of someone selling firearms in the Bronx and trying to build a case against that gun trafficker. He was not interested in issuing a traffic summons nor was he interested in making a low-level marijuana arrest.

No rule, regulation or section of the Patrol Guide was advanced for the proposition that the Respondent was mandated to issue a traffic summons or make a marijuana arrest. Indeed, the

two sections of the Patrol Guide cited in this specification deal with a person under arrest or a person who is a prisoner. [REDACTED] was neither at the time

The Department may well be troubled about the Respondent's tactics in this case. It may well view the transporting of [REDACTED] as a passenger in his own vehicle without handcuffs to be dangerous, but it has offered no evidence to establish that this was actionable misconduct.

Because the Department has failed to establish the charges as alleged in this specification, the Respondent is found Not Guilty.

Specification No. 2

The Respondent is charged with disregarding a notification to appear in court on January 21, 2009. The appearance log for the Intelligence Division (DX 1), the Respondent's overall command, indicated that ADA Isales put in a notification for the Respondent on January 8, 2009, for the 21st, concerning [REDACTED]'s case. The log stated that the notification was e-mailed to the Respondent, who received Department e-mails on his work-issued BlackBerry. The notification print-out itself was admitted as DX 2. This was received by the IAB investigator from Intel. On it was handwritten "1355 - 1/8 Faxed." That is, the notification was ostensibly faxed on January 8, 2009, at 1355 hours, to the Respondent's office, a separate building from the 52 Precinct station house.

The Respondent contended that he never received the notification. He testified that his BlackBerry had problems receiving e-mail at one time due to an over-sensitive firewall placed by MISD.

The Department failed to prove by a preponderance of the evidence that the Respondent received this notification. The very traceability of electronic mail renders the log comment "e-

mailed ' insufficient A copy of the e-mail, allegedly sent by Intel to the Respondent's Department address, was not produced This would show from whom and where, and when, the e-mail was sent A list of e-mails received at the Respondent's e-mail address also would have been useful, but was not produced

Aside from the e-mail, the lack of information about what happened with the notification sheet after it was faxed makes the Department's case insufficient. While the Court does not expect someone to remember handing out one of hundreds if not thousands of notifications, there is a paper trail in these matters that the Department could have relied on For example, in *Case Nos 83163/07 & 83164/07*, signed Sept 17, 2009, a patrol supervisor initialed the precinct's notification control sheet, admitted as an exhibit, next to the names of the two officers accused of disregarding a court notification He credibly testified that he would not have initialed the sheet if he did not hand the notifications themselves to the officers, his normal practice

No similar procedure was introduced in the Respondent's case No one from the 52 Precinct testified that the notification was received there, and either left for the Respondent to pick up or given to him (he testified that he signed in for work at the 52 Precinct desk), as might have been memorialized by a 52 Precinct log or control sheet

Because there was insufficient evidence that the Respondent actually received the notification, he is found Not Guilty of the second specification

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED
JUN 20 2011

RAYMOND W. KELLY
POLICE COMMISSIONER